Testimony of Chai R. Feldblum

Professor of Law

Director, Federal Legislation Clinic

Georgetown University Law Center

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Restoring Congressional Intent and Protections

Under the Americans with Disabilities Act

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Mr. Chairman and Members of the Committee, I am pleased to testify before you today. My name is Chai Feldblum, and I am a Professor of Law and Director of the Federal Legislation Clinic at Georgetown University Law Center. The lawyers and students at the Federal Legislation Clinic provide *pro bono* legislative lawyering services to the Epilepsy Foundation in support of its efforts to advance the ADA Restoration Act.

Today, however, I am testifying on my own behalf as an expert on the Americans with Disabilities Act of 1990 (ADA). During passage of the ADA, I served as one of the lead legal advisors to the disability and civil rights communities in the drafting and negotiating of that legislation.

In this testimony, I provide a brief overview of the bipartisan support that propelled passage of the ADA in 1990 and describe how Congress intended the ADA's definition of disability to be consistent with the definition of "handicap" that had been applied by the courts for fifteen years under Sections 501, 503 and 504 of the Rehabilitation Act of 1973. I then explain how the courts have narrowed the definition of disability under the ADA in a manner that is inconsistent with Congressional intent and I offer some observations on why the courts may have acted in such a manner. Finally, I explain how the current status quo should be considered unacceptable to any Congress that cares about providing substantive and real protection for people with disabilities and how the only way to fix this problem is to fix the language of the ADA itself.

I. The Bi-Partisan Enactment of the ADA

A first version of the ADA was introduced in April 1988 by Senators Lowell Weicker and Tom Harkin and twelve other cosponsors in the Senate, and by Congressman Tony Coelho and 45 cosponsors in the House of Representatives.[1] This version of the ADA was based on a draft from the National Council on Disability (NCD), an independent federal agency composed of 15 members appointed by President

[1] H.R. 4498, 100th Cong., 2d Sess., 134 CONG. REC. H2757 (daily ed. Apr. 29, 1988) (introduction of H.R. 4498); S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. S5089 (daily ed. Apr. 28, 1988) (introduction of S. 2345).

George H.W. Bush which was established by Congress to advise the President and Congress on issues concerning people with disabilities.[2]

In May 1989, a second version of the ADA was introduced by Senators Tom Harkin, Edward Kennedy, Robert Dole, Orrin Hatch and 30 cosponsors in the Senate, and by Congressman Steny Hoyer and 45 cosponsors in the House of Representatives.[3] This version of the bill was the result of extensive discussions with a wide range of interested parties, including members of the disability community, the business community, and the first Bush Administration.[4]

Negotiations on the ADA continued within each committee that reviewed the bill and, in each case, the negotiations resulted in broad, bipartisan support of the legislation. The Senate Committee on Labor and Human Resources favorably reported the bill by a vote of 16-0;[5] the House Committee on Education and Labor favorably reported the bill by a vote of 35-0;[6] the House Committee on Energy and Commerce favorably reported the bill by a vote of 40-3;[7] the House Committee on Public Works and Transportation favorably reported the bill by a vote of 45-5;[8] and the House Committee on the Judiciary favorably reported the bill by a vote of 32-3.[9]

After being reported out of the various committees, the ADA passed the Senate by a vote of 76-8 in September 1989 and the House of Representatives by a vote of 403-20 in May 1990.[10] Both Houses of Congress subsequently passed the conference

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[2] NATIONAL COUNCIL ON DISABILITIES, ON THE THRESHOLD OF INDEPENDENCE (1988), *available at* http://www.ncd.gov/newsroom/publications/1988/threshold.htm. Lowell Weicker, at that time, the Republican Senator from Connecticut and the ranking minority member of the Subcommittee on the Handicapped, was approached by the National Council on Disability to take the lead on the ADA because of his longstanding interest in the area of disability rights. Senator Tom Harkin, a Democratic Senator from Iowa and Chairman of the Subcommittee on the Handicapped, worked closely with Senator Weicker in this endeavor. In the House of Representatives, Congressman Tony Coelho, a Democrat from California and third-ranking Member in the House Democratic Leadership, was the key leader in the development of the ADA.

[3] H.R. 2273, 101st Cong., 1st Sess., 135 CONG. REC. H1791 (daily ed. May 9, 1989); S. 933, 101st Cong., 1st Sess., 135 CONG. REC. S4984-98 (daily ed. May 9, 1989).

[4] *See* Chai R. Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 TEMPLE LAW REVIEW 521, 521-532 (1991) (providing a brief overview of passage of the ADA, including a brief description of the various stages of negotiation on the bill).

[5] S. REP. NO. 101-116 at 1 (1989).

[6] H.R. REP. NO. 101-485, pt. 2, at 50 (1990).

[7] H.R. REP. NO. 101-485, pt. 4, at 29 (1990).

[8] H.R. REP. NO. 101-485, pt. 1, at 52 (1990).

[9] H.R. REP. NO. 101-485, pt. 3, at 25 (1990).

[10] 135 CONG. REC. S10803 (daily ed. Sept. 7, 1989); 136 CONG. REC. H2638 (daily ed. May 22, 1990).

report by large margins as well: 91-6 in the Senate and 377-28 in the House of Representatives.[11]

On July 26, 1990, President George H.W. Bush signed the ADA into law, stating:

> "[N]ow I sign legislation which takes a sledgehammer to [a] . . . wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but could not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America."[12]

Standing together, leaders from both parties described the ADA as "historic," "landmark," and an "emancipation proclamation for people with disabilities."[13]

The purpose of the original legislation was to "provide a clear and comprehensive national mandate for the elimination of discrimination" on the basis of disability, and "to provide clear, strong, consistent, enforceable standards" for addressing such discrimination.[14] It was Congress' hope and intention that people with disabilities would be protected from discrimination in the same manner as those who had experienced discrimination on the basis of race, color, sex, national origin, religion, or age.[15]

But that did not happen. In recent years, the Supreme Court has restricted the reach of the ADA's protections by narrowly construing the definition of disability contrary to Congressional intent. As a result, people with a wide range of impairments whom Congress intended to protect, including people with cancer, epilepsy, diabetes, hearing loss, multiple sclerosis, HIV infection, intellectual disabilities, post-traumatic stress disorder (PTSD), and many other impairments, are routinely found not to be "disabled" and therefore not covered by the ADA.

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[11] 136 CONG. REC. S9695 (daily ed. July 13, 1990); 136 CONG. REC. H4629 (daily ed. July 12, 1990).

[12] Remarks of President George H.W. Bush at the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990), *available at* http://www.eeoc.gov/ada/bushspeech.html.

[13] According to President George H.W. Bush, the ADA was a "landmark" law, an "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities." *See id*. Senator Orrin G. Hatch declared that the ADA was "historic legislation" demonstrating that "in this great country of freedom, . . . we will go to the farthest lengths to make sure that everyone has equality and that everyone has a chance in this society." Senator Edward M. Kennedy called the ADA a "bill of rights" and "emancipation proclamation" for people with disabilities. *See* National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 1: Introductory Paper* (October 16, 2002), available at http://www.ncd.gov/newsroom/publications/2002/rightingtheada.htm.

[14] *See* Americans with Disabilities Act § 2(b), 42 U.S.C. § 12101(b) (2007).

[15] 42 U.S.C. § 12101 (a), (b).

The difficulty with this scope of coverage under the ADA is *significant* – studies show that plaintiffs lose 97% of ADA employment discrimination claims, frequently on the grounds that they do not meet the definition of "disability."[16] The National Council on Disability has stated that Supreme Court decisions narrowing the definition of disability "ha[ve] significantly diminished the civil rights of people with disabilities," "blunt[ing] the Act's impact in significant ways," and "dramatic[ally] narrowing and weakening . . . the protection provided by the ADA."[17]

As demonstrated by the legislative history of the ADA, Congress never intended the law's definition to be interpreted in such a restrictive fashion.

II. Congressional Intent Behind the ADA's Definition of Disability

When writing the ADA that was introduced in 1989, Congress borrowed the definition of "disability" from Sections 501, 503 and 504 of the Rehabilitation Act of 1973, a predecessor civil rights statute for people with disabilities that covered the federal government, federal contractors, and recipients of federal financial assistance. For purposes of Title V of the Rehabilitation Act, "handicap" was defined as: (1) a physical or mental impairment that substantially limits one or more of the major life

[16] Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I – Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (July/August 2007) (stating that in 2006, "[o]f the 218 [employment discrimination] decisions that resolved the claim (and have not yet changed on appeal), 97.2 percent resulted in employer wins and 2.8 percent in employee wins"); *see also* Amy L. Allbright, *2003 Employment Decisions Under the ADA Title I – Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 319-20 (May/June 2003) ("One such obstacle [for plaintiffs to overcome] is satisfying the requirements that the plaintiff meet the ADA's restrictive definition of disability – a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment – and still be qualified to perform essential job functions with or without reasonable accommodation. *A clear majority of the employer wins in this survey were due to employees' failure to show that they had a protected disability.*") (emphasis added); *see also* Ruth Colker, *Winning and Losing Under the ADA*, 62 OHIO ST. L.J. 239, 246 (2001) ("[A]ppellate litigation outcomes under the ADA are more pro-defendant than under other civil rights statutes."); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100-01 ("[C]ontrary to popular media accounts, defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, defendants prevail in eighty-four percent of reported cases. These results are worse than results found in comparable areas of the law; only prisoner rights cases fare as poorly.").

[17] NATIONAL COUNCIL ON DISABILITIES, RIGHTING THE ADA, pt. I (2004), *available at* http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm.

activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.[18]

For fifteen years, the courts had interpreted this definition to cover a wide range of physical and mental impairments, including epilepsy, diabetes, intellectual and developmental disabilities, multiple sclerosis, PTSD, and HIV infection.[19] Indeed, in *School Board of Nassau County v. Arline*, the Supreme Court explicitly acknowledged that Section 504's "definition of handicap is broad," and that by extending the definition to cover those "regarded as" handicapped, Congress intended to cover those who are not limited by an actual impairment but are instead limited by "society's accumulated myths and fears about disability and disease."[20]

When the ADA was enacted, Congress consistently referred to court interpretations of "handicap" under Section 504 as its model for the scope of "disability" under the ADA. For example, the Senate Committee on Labor and Human Resources noted that: "the analysis of the term 'individual with handicaps' by the Department of Health, Education and Welfare in the regulations implementing section 504 . . . apply to the definition of the term "disability" included in this legislation."[21] Similarly, the House Committee on the Judiciary observed that: "The ADA uses the same basic definition of 'disability' first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988. . . . [I]t has worked well since it was adopted in 1973."[22]

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[18] 29 U.S.C. § 705(20)(B) (2007); *see* Americans with Disabilities Act, 42 U.S.C. § 12101(2) (2007). At the time the ADA was being drafted, Section 504 used the term "handicap" rather than "disability." Section 504 has since been amended to use the term "disability." The definition of "handicap" under Section 504 and of "disability" under the ADA is identical.

[19] *See, e.g.,* Local 1812, Am. Fed'n. of Gov't Employees v. U.S., 662 F. Supp. 50, 54 (D.D.C. 1987) (person with HIV disabled); Reynolds v. Brock, 815 F.2d 571, 573 (9th Cir. 1987) (person with epilepsy disabled); Flowers v. Webb, 575 F. Supp. 1450, 1456 (E.D.N.Y. 1983) (person with intellectual and developmental disabilities disabled); Schmidt v. Bell, No. 82-1758, 1983 WL 631, at *10 (E.D. Pa. Sept. 9, 1983) (person with PTSD disabled); Bentivegna v. U.S. Dep't of Labor, 694 F.2d 619, 621 (9th Cir. 1982) (person with diabetes disabled); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1376 (10th Cir. 1981) (person with multiple sclerosis disabled). *See generally* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 128 (2000) (hereinafter "Definition of Disability") ("[A]lthough there had been . . . a few adverse judicial opinions under Section 504 that had rejected coverage for plaintiffs with some impairments, those opinions were the exception, rather than the rule, in litigation under the Rehabilitation Act.")

[20] *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

[21] S. REP. NO. 101-116 at 21 (1989).

[22] H.R. REP. NO. 101-485, pt. 3, at 27 (1990).

Second, the committee reports explicitly stated that mitigating measures should not be taken into account in determining whether a person has a "disability" for purposes of the ADA. As the Senate Committee on Labor and Human Resources put it:

> A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. . . . [W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.[23]

Finally, the Committee reports specifically referenced the breadth of the interpretation offered by the Supreme Court in the *Arline* decision with regard to the third prong of the definition of disability, the "regarded as" prong. During oral argument in the *Arline* case, the Solicitor General had sought to reject an interpretation of the "regarded as" prong that would have established coverage for any individual with an impairment, as long as the impairment was proven by the individual to have been the *basis* of an adverse decision. As the Solicitor General argued, such an approach would allow plaintiffs to make "a totally circular argument which lifts itself by its bootstraps."[24]

But the Supreme Court had responded that "[t]he argument is not circular, however, but direct."[25] As the Court explained: "Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work."[26] And, as the Court went on to explain*:* "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[27] That was the situation in the *Arline* case, where a school board regarded an individual with tuberculosis that was no longer limiting any of her major life activities as nonetheless limited in her *one job* of being a schoolteacher.

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[23] S. REP. NO. 101-116 at 121 (1989).
[24] *Arline*, 480 U.S. at 283 n.10 (1987).
[25] *Id.*
[26] *Id.*
[27] *Id.* at 283; *see* Feldblum, *Definition of Disability*, *supra* note 19, 116-118 for a full analysis of the *Arline* opinion.

The Committee reports to the ADA endorsed this view of the third prong of the definition. As the Senate Committee on Labor and Human Resources Report summarized the coverage under the third prong: "A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes toward disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the 'negative reactions' of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong."[28]

Because coverage under the third prong relies on a discriminatory action by one entity (e.g., an employer or a business), the fact that other entities may not hold the same adverse perception of the individual with the actual or perceived impairment is irrelevant. As the House Committee on the Judiciary Report put it: "[A] person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field, and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition."[29]

As evident from the ADA's legislative history, Congress' decision to adopt Section 504's definition of disability was a deliberate decision to cover the same wide group of individuals who had been covered under that law. Congress expected that the definition of "disability" would be interpreted as broadly under the ADA as it had been interpreted under the existing disability rights law for over fifteen years.

Disability rights advocates like myself – blissfully unaware of what the future would hold for the definition of disability – fully supported Congress' incorporation of the Section 504 definition into the ADA. We agreed with Congress' legal judgment that the

[28] S. REP. NO. 101-116 at 24 (1989); *see also* H.R. REP. NO. 101-485, pt. 2, at 53 (1990) (discussing *Arline*)
[29] H.R. REP. NO. 101-485, pt. 3, at 30 (1990).

fifteen-year-old definition would cover people with a wide range of physical and mental impairments, based on the record in the case law under Section 504. In addition, we were particularly reassured by the reasoning of the Supreme Court just two years earlier in the *Arline* case – the case so consistently referred to in the various committee reports. Under the Court's interpretation, the third prong of the definition was sufficiently broad to capture *any individual who had been explicitly discriminated against <u>because of</u> an actual or perceived impairment*, regardless of how minor that impairment was if it existed (e.g., a cosmetic disfigurement or a burn) or even if no impairment existed at all.

We were soon to be rudely surprised by new interpretations of the definition of disability by various courts, including the Supreme Court.

III. Judicial Narrowing of Coverage Under the ADA

Over the past several years, the Supreme Court and lower courts have narrowed coverage under the ADA by interpreting *each and every component* of the ADA's definition of disability in a *strict and constrained fashion*. This has resulted in the exclusion of many persons that Congress intended to protect.[30]

The Supreme Court has narrowed coverage under the ADA in three primary ways:

(A) In 1999, by requiring that courts take into account mitigating measures when determining whether a person is "substantially limited in a major life activity";

(B) Also in 1999, by requiring people who allege that they are regarded as being substantially limited in the major life activity of working (because an employer has refused to hire them for a job based on an actual or perceived impairment) show that the discriminating employer believed them incapable of performing not just the one job they had been denied, but also a *broad range of jobs*; and

(C) In 2002, by requiring that the term "substantially limited" be applied in a very strict manner and that the term "major life activity" be understood as covering only activities that are of "central importance" to most people's lives.

[30] *See* Appendix A for coverage of people under Section 504 as compared to the ADA; *see* Appendix B for case stories of people denied coverage under the ADA.

A. Mitigating Measures

The Supreme Court, in a trio of cases decided in June 1999, ruled that mitigating measures – medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise, or any other treatment – must be considered in determining whether an individual's impairment substantially limits a major life activity.[31]

Sutton v. United Airlines

In *Sutton v. United Airlines*, twin sisters, Karen Sutton and Kimberly Hinton, applied to United Airlines for jobs as commercial airline pilots. While they met United's age, education, and experience requirements, and had obtained all the appropriate pilot certifications, they did not meet United's minimum vision requirement of uncorrected vision of 20/100 or better. Ms. Sutton and Ms. Hinton were severely nearsighted (myopia), with uncorrected vision of 20/200 in the right eye and 20/400 in the left eye. But with glasses or contact lenses, they could see as well as people without myopia. When United terminated their job interviews and refused to offer them pilot positions, Ms. Sutton and Ms. Hinton filed a claim under the ADA, alleging that United had discriminated against them on the basis of disability in violation of the ADA.[32]

The *Sutton* case raised the question whether individuals who mitigate their impairments should be considered persons with disabilities under the ADA. The eight federal Courts of Appeals that had addressed this issue prior to the *Sutton* case had agreed with guidance issued by the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), which explicitly stated that that the mitigating effects of medication or devices on an impairment should *not* be taken into account in determining whether an individual's impairment substantially limits the individual in a major life activity.[33] In *Sutton*, however, the Tenth Circuit (affirming the district court) concluded to the contrary, creating a split in the circuits. The Supreme Court resolved this split by affirming the Tenth Circuit's determination that mitigating measures *should* be taken into account in determining disability under the ADA.[34]

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[31] Sutton v. United Airlines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).
[32] *Sutton*, 527 U.S. at 475-76.
[33] *Id.* at 496-97 (Stevens, J., dissenting) (listing cases).
[34] *Id.* at 477, 495-96.

Relying exclusively on a plain reading of the statute, the Supreme Court reasoned that three provisions of the ADA required it to conclude that plaintiffs should be viewed in their "corrected state" in determining whether their impairments substantially limited their major life activities. First, because "the phrase 'substantially limits' appears in the Act in the present indicative verb form," it was proper to read that language as "requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability."[35] Second, because the Act defines disability "with respect to an individual" and requires that an impairment substantially limit "the major life activities of such individual," the Court concluded that the law necessarily requires an "individualized inquiry."[36] Indeed, the Court explained, the EEOC had emphasized the need for such an individualized assessment, and yet its "directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA."[37] Finally, since Congress had stated in its findings that there were 43 million people with disabilities, it was logically inconsistent to presume that Congress intended to cover the 100 million people estimated to have vision impairments. Thus, the finding regarding the number of people covered under the law "is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures."[38]

The Court concluded that the "[EEOC's and DOJ's] guidelines – that persons are to be evaluated in their hypothetical uncorrected state – is an *impermissible interpretation* of the ADA."[39] The fact that the Senate Labor and Human Resources Committee Report, the House Judiciary Committee Report, and the House Education and Labor Committee Report had all offered the same interpretation as the agencies was irrelevant to the Court based on the following reasoning:

> [b]ecause we decide that, *by its terms*, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history.[40]

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[35] *Id.* at 482.
[36] *Id.* at 483.
[37] *Id.*
[38] *Id.* at 487.
[39] *Id.* at 482 (emphasis added).
[40] *Id.*

Having concluded that three congressional committees, eight circuit courts, and two agencies had impermissibly interpreted the ADA by not considering mitigating measures, the Supreme Court held that Karen Sutton and Kimberly Hinton were not substantially limited in any major life activity and therefore were not covered by the ADA. Because Ms. Sutton and Ms. Hinton were found not to be "disabled," the Court never reached the question whether they were qualified to perform the job or whether United's vision requirement was discriminatory.[41]

Murphy v. United Parcel Service

In *Murphy v. United Parcel Service*, the United Parcel Service (UPS) hired Vaughn L. Murphy as a mechanic. The job required Mr. Murphy to drive commercial motor vehicles. According to Department of Transportation (DOT) health requirements, drivers of commercial motor vehicles in interstate commerce must have "no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely." Mr. Murphy has had hypertension (high blood pressure) since he was ten years old. With medication, however, "he can function normally and can engage in activities that other persons normally do."[42]

At the time UPS hired him, Mr. Murphy's blood pressure was too high for Mr. Murphy to qualify for a DOT health certification. However, due to an error, he was erroneously granted certification and he started working for UPS. About a month later, a UPS medical supervisor discovered the error while reviewing Mr. Murphy's medical files and requested that he have his blood pressure retested. Upon retesting, Mr. Murphy's blood pressure, at 160/102 and 164/104, was not low enough to qualify him for the 1-year certification that he had incorrectly been issued, but it was sufficient to qualify him for an optional temporary DOT health certification. UPS fired Mr. Murphy on the grounds that his blood pressure exceeded DOT's requirement and refused to allow him to attempt to obtain the optional temporary certification.[43]

Believing UPS had discriminated against him based on disability, Mr. Murphy brought a claim under the ADA. Both the district court and the Tenth Circuit Court of Appeals determined that since Mr. Murphy functioned normally with medication, his high

[41] *Id.* at 493-94.
[42] *Murphy*, 527 U.S. at 519-20.
[43] *Id.*

blood pressure did not substantially limit him in any major life activity and thus was not covered by the ADA. The Supreme Court agreed, citing its holding in *Sutton* that the determination of disability should be made with reference to mitigating measures. Because Mr. Murphy was found not to be "disabled" for purposes of the ADA, the Court never reached the question whether Mr. Murphy was qualified to perform the job or whether UPS had discriminated against him by refusing to allow him to obtain a temporary DOT health certification.[44]

Albertson's, Inc. v. Kirkingburg

In August 1990, Albertson's, Inc., a grocery-store chain, hired Hallie Kirkingburg as a truckdriver. Mr. Kirkingburg had more than ten years' driving experience and performed well on his road test for the job. Mr. Kirkingburg has an uncorrectable vision condition that involves weakened vision in one eye, so that he has in effect "monocular" vision, or vision in only one eye. Over time, Mr. Kirkinburg had learned to compensate for the weakened vision in his left eye by making subconscious adjustments to the manner in which he senses depth and perceived peripheral objects in his right eye.[45]

Before he started working, Albertson's required Kirkingburg to be examined by a doctor to see if he met federal DOT vision standards for commercial truck drivers. Despite Kirkingburg's weakened vision in his left eye, the examining doctor erroneously certified that Kiringburg met the DOT's basic vision standards. In December 1991, Mr. Kirkingburg took a leave of absence after injuring himself when he fell from the cab of his truck. Albertson's required returning employees to undergo a physical examination, which Mr. Kirkingburg did in November 1992. This time, the examining physician correctly assessed Kirkingburg's vision and found that his eyesight did not meet the basic DOT standards. Mr. Kirkingburg was told that he would have to obtain a waiver of the DOT's basic vision standards in order to be qualified to drive. DOT had a process for giving certification to applicants with deficient vision who had three years of recent experience driving a commercial vehicle with a clean driving record.[46]

Mr. Kirkingburg applied for a waiver, but while his application was pending, Albertson's fired him because he could not meet the basic DOT vision standard.

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[44] *Id.* at 520-22, 525.
[45] *Albertson's*, 527 U.S. at 558-59, 565.
[46] *Id.* at 559-60.

Although Mr. Kirkingburg ultimately received a DOT waiver, Albertson's still refused to rehire him.[47]

Mr. Kirkingburg brought suit alleging that Albertson's violated the ADA by firing him. The district court ruled that Mr. Kirkingburg was not qualified for the job, and that Albertson's was not required, as a reasonable accommodation, to give him time to get a DOT waiver. The Ninth Circuit Court of Appeals reversed the district court's decision, holding that Albertson's could not use the DOT vision standard as the justification for its vision requirement and yet disregard the waiver program that was a legitimate part of the DOT program. Albertson's also argued for the first time before the Ninth Circuit that Mr. Kirkingburg did not have a disability within the meaning of ADA. The Ninth Circuit rejected this argument, concluding that Mr. Kirkingburg had presented evidence that his vision was effectively monocular, and thus "the manner in which he sees differs significantly from the manner in which most people see."[48]

The Supreme Court reversed the Ninth Circuit, concluding that it had been "too quick to find a disability."[49] According to the Court, the Ninth Circuit's determination that Mr. Kirkingburg's manner of seeing was "different" from others was insufficient to show disability. Instead, Mr. Kirkingburg's sight must be "significantly restricted." Second, the Court determined that *Sutton*'s mandate that courts consider mitigating measures includes "measures undertaken, whether consciously or not, with the body's own systems."[50] Thus, the Ninth Circuit should have considered the ability of Mr. Kirkingburg's brain to compensate for his monocular vision in determining whether he had a disability.[51] Third, contrary to the individualized assessment required under the ADA, the Ninth Circuit failed to identify the *extent* of Mr. Kirkingburg's visual restrictions.[52]

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[47] *Id.* at 560.
[48] *Id.* at 561.
[49] *Id.* at 564.
[50] *Id.* at 565-66.
[51] *Id.*
[52] As for Albertson's' primary contention – that Mr. Kirkingburg was not qualified – the Court declared that Albertson's had both a "right" and an "unconditional obligation" to follow the DOT commercial truck driver regulations. Id. at 570. The Supreme Court ruled that "[t]he waiver program was simply an experiment with safety" and "did not modify the general visual acuity standards." *Id.* at 574. Since the DOT regulation did not require employers of commercial drivers to participate in the experimental waiver program, Albertson's was free to decline to do so. *Id.* at 577.

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The Supreme Court's requirement that courts consider mitigating measures creates an unintended paradox: people with serious health conditions like epilepsy and diabetes, who are fortunate enough to find treatment that makes them more capable and independent, and thus more able to work, find they are not protected by the ADA because the limitations arising from their impairments are not considered substantial enough. Ironically, the better a person manages his or her medical condition, the less likely that person will be protected from discrimination, even if an employer admits that he or she dismissed the person *because of* that person's (mitigated) condition.[53]

B. Broad Range of Jobs Under "Regarded as" Prong

In *Sutton*, the sisters had also argued that United "regarded" them as substantially limited in the major life activity of working and, therefore, that they should be covered under the third prong of the definition of disability. They contended that United's vision requirement "substantially limited their ability to engage in the major life activity of working by precluding them from obtaining the job of global airline pilot."[54]

The Supreme Court rejected that analysis by applying the EEOC's regulations concerning the major life activity of "working" to the third prong of the definition – despite EEOC's explicit guidance to the contrary.

The Court ruled that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a *broad class of jobs*."[55] As support for this ruling, the Court quoted a sentence from the regulation interpreting the phrase "substantially limits": "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."[56] The Court thus concluded that because

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[53] *See* examples below in Section IV.
[54] *Sutton*, 527 at 490.
[55] *Id.* at 491.
[56] *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(i)). The regulation states:

> (3) With respect to the major life activity of working--
> (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

the sisters had failed to show that United regarded them as incapable of performing a *broad range of jobs*–beyond the single job of "global airline pilot"–they were not regarded as being substantially limited in the major life activity of working.[57]

In reaching its conclusion, the Court ignored the EEOC's guidance on how the major life activity of working was to be understood *differently* for purposes of the first and third prongs of the definition of disability. The EEOC had noted in its guidance that the major life activity of working should be considered under the first prong of the definition only in the rare situation in which an individual was not limited in any *other* major life activity.[58] As noted above, in most cases decided under the Rehabilitation Act, individuals with a range of impairments had been held by the courts (without significant analysis) to be substantially limited in such major life activities as standing, lifting, breathing, walking, bending, seeing or hearing. Thus, according to the EEOC, the only time an individual should argue that he or she was limited in the major life activity of working under the first prong of the definition was when the person was not experiencing a limitation in any other life activity. In such circumstances, the EEOC regulations provided, the individual would have to prove that he or she was limited in a broad class of jobs, and not just in one job.[59]

By contrast, the EEOC's guidance for "*Regarded as* Substantially Limited in a Major Life Activity" was quite different.[60] In that section of the guidance, the EEOC explained as follows:

> The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work

[57] *Id.* at 493.
[58] See 29 CFR pt. 1630, App. §1630.2(j) ("If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. *If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working*.") (emphasis added.)
[59] *Id.*
[60] See 29 CFR pt. 1630, App. §1630.2(l) (emphasis added).

> as a result of the negative reactions of others to the impairment." 480 U.S. at 283. . .
>
> An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, *whether or not the employer's or other covered entity's perception were shared by others in the field* and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. . .
>
> Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.[61]

Unfortunately, the Supreme Court ignored the logic of the EEOC's guidance and imported to the third prong of the definition a restriction that had made sense under the first prong of the definition, but made no sense at all under the third prong. The formulation enunciated by the Supreme Court now erects an almost impossible threshold for any individual seeking coverage under the third prong. The Court's approach requires that an individual essentially both divine and prove an employer's subjective state of mind. Not only must an individual demonstrate that the employer believed the individual had an impairment that prevented him or her from working for that employer in that job, the individual must also show that the employer thought that the impairment would prevent the individual from performing a broad class of jobs for other employers. As it is safe to assume that employers do not regularly consider the panoply of other jobs that prospective or current employees could or could not perform – and certainly do not often create direct evidence of such considerations – the individual's burden becomes essentially insurmountable.

While the "one-two punch" of the *Sutton* trilogy–requiring consideration of mitigating measures under the first prong of the definition and requiring proof of being regarded as substantially limited in a range of jobs under the third prong of the definition—began the slide toward non-coverage under the ADA for people with a range

[61] *Id*. (emphasis added)

of physical and mental impairments, the Court made the situation worse three years later in another decision regarding the definition of disability.

C. Demanding Standard: Substantially Limits a Major Life Activity

In 2002, the Supreme Court considered the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[62] In that case, Toyota Motor Manufacturing, Kentucky, Inc., hired Ella Williams to work on an engine assembly line at its car manufacturing plant in Georgetown, Kentucky. Soon after she began to work with pneumatic tools (tools using pressurized air), Ms. Williams developed carpal tunnel syndrome and tendonitis that caused pain in both of her hands, wrists, and arms. Williams' personal physician placed her on permanent work restrictions that precluded her from lifting more than 20 pounds, from frequent lifting of even lighter objects, from constant repetitive motions of her wrists or elbows, from performing overhead work, and from using vibratory or pneumatic tools.[63]

As a result, Toyota assigned Ms. Williams to various modified duty jobs. Eventually she was assigned to work as part of a Quality Control Inspection Operations team, where she routinely performed two of the four tasks of the team, both of which involved solely visual inspections. Ms. Williams satisfactorily performed these tasks for a period of two years.

Toyota then decided that all members of the teams should rotate through all four of the Quality Control Inspection tasks. Ms. Williams was therefore ordered to apply highlight oil to several parts of cars as they passed on the assembly line, requiring her to hold her hands and arms up around her shoulder level for several hours at a time. As a result, she began experiencing pain in her neck and shoulders, and was diagnosed as having several medical conditions that cause inflammation and pain in the arms and shoulders.[64] Toyota refused to make an exception to its policy and permit Williams to continue performing only the visual inspection tasks.

Ms. Williams filed an ADA claim, alleging that Toyota had failed to accommodate her disability. The district court ruled that Ms. Williams was not "disabled" under the

[62] 534 U.S. 184 (2002).
[63] *Id.* at 187-88.
[64] *Id.* at 188-90.

ADA because her impairments did not substantially limit her in a major life activity. The Sixth Circuit Court of Appeals reversed, holding that Ms. Williams' impairments did substantially limit her in the major life activity of performing manual tasks. The Supreme Court reversed, holding that the Sixth Circuit had failed to apply the proper standard in determining whether Ms. Williams was disabled "because it analyzed only a limited class of manual tasks and failed to ask whether [Ms. Williams'] impairments prevented or restricted her from performing tasks that are of central importance to most people's daily lives."[65]

The full adverse import of the Supreme Court's ruling, however, lay in its broad pronouncements regarding the proper interpretation of the words "substantially limits" and "major life activities." The Court stated that, given the finding in the ADA that 43 million people have disabilities, these terms "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[66] Indeed, "[i]f Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number would surely have been much higher."[67]

According to the Court, "'[s]ubstantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree.'"[68] Therefore, the Court reasoned, "the word 'substantial' clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from constituting disabilities" under the ADA.[69] The Court also stated that "'[m]ajor' in the phrase 'major life activities' means important," and so "major life activities" refers to "those activities that are of central importance to daily life," including "household chores, bathing, and brushing one's teeth."[70]

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[65] *Id.* at 187.
[66] *Id.* at 197.
[67] *Id.*
[68] *Id.* at 196.
[69] *Id.* at 197.
[70] *Id.* at 197, 201-02. Because Ms. Williams was able to brush her teeth and do laundry, she was therefore *not* substantially limited in the activities of central importance to the daily lives of most people. *Id*. at 202.

As a result of this ruling, people alleging discrimination under the ADA must now show that their impairments *prevent* or *severely restrict* them from doing activities that are of *central importance* to *most* people's daily lives.[71]

* * *

Through these three aspects of interpretation, the Supreme Court and the lower courts have dramatically changed the meaning of "disability" under the ADA over the past number of years so as to make it almost unrecognizable. Many of the people whom Congress intended to protect find that they are no longer "disabled" under the ADA; they are never even given the opportunity to show they can do the job and were treated unfairly because of their medical condition.

The Supreme Court's narrow reading is in marked contrast to the cases that had been decided under the Rehabilitation Act, which Congress had before it as precedent when it enacted the ADA. In these cases, the courts had tended to decide questions of coverage easily and without extensive analysis.[72] This narrow reading is likewise inconsistent with other civil rights statutes, such as the Civil Rights Act of 1964, upon which the ADA was modeled[73] and which courts have also interpreted broadly.[74] Indeed, under the Rehabilitation Act and Title VII of the Civil Rights Act, courts rarely tarried long on the question of whether the plaintiff in a case was "really a handicapped individual," or "really a woman," or "really black." Instead, these cases tended to focus on the essential causation requirement: i.e., had the individual proven that the alleged discriminatory action had been taken *because of* his or her handicap, race, or gender?[75]

But how did this happen? How did a statutory definition that Members of Congress and disability rights advocates felt would ensure protection for a broad range

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[71] *Id.* at 197.
[72] Feldblum, *Definition of Disability*, *supra* note 19, at 128; *see also* Appendix A, for coverage of people under Section 504 as compared to the ADA.
[73] 42 U.S.C. § 12101 (2007) ("[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.").
[74] *See, e.g.,* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 381 (1977) (Marshall and Brennan, JJ., concurring in part and dissenting in part) ("Title VII is a remedial statute designed to eradicate certain invidious employment practices . . . [and], under longstanding principles of statutory construction, the Act should be given a liberal interpretation." (internal quotation marks and citation omitted)).
[75] Feldblum, *Definition of Disability*, *supra* note 19, at 106.

of individuals end up becoming the principal means of restricting coverage under the ADA?

There is a range of academic literature on this question, including some to which I have contributed. But let me point out here simply one observation. From my reading of the cases, it seems to me that the instinctive understanding by many courts of the term "disability" is that it is synonymous with an "inability to work or function," and concomitantly, that people with disabilities are thus necessarily viewed as significantly different from "the rest of us."

This view of disability may have been influenced by the fact that most disability cases heard by courts prior to the ADA regarded claims for disability payments under Social Security. In those cases, an individual was required to demonstrate that he or she had a "medically determinable physical or mental impairment" that made him or her unable "to engage in any substantial gainful activity" – i.e., that he or she was unable to work.[76] Hence, it may have been difficult for courts to grasp that the Congressional intent under the ADA was to capture a much broader range of individuals with physical and mental impairments than those intended to be covered under Social Security disability law.[77]

But a civil rights law is not a disability payment law. The goal of the ADA is to prohibit *discrimination* against a person because of his or her disability. A person does not have to be unable to work in order to face discrimination based on his or her impairment. On the contrary, people who are perfectly able to perform their jobs – sometimes thanks to the very medications or devices they use – are precisely the ones who may face discrimination because of myths, fears, ignorance, or stereotypes about their medical conditions.

Similarly, in a civil rights context, requiring a person to meet an extremely high standard for qualifying as "disabled" is counter-intuitive if an employer has taken an adverse action based on an individual's physical or mental impairment. Requiring the person to reveal private, highly personal, and potentially embarrassing facts to employers and judges about the various ways the individual's impairment impacts daily

[76] 42 U.S.C. § 423(d)(1)(A) (2007) (SSDI); 42 U.S.C. § 1382c(a)(3)(A) (2007) (SSI).
[77] *See* Feldblum, *Definition of Disability*, *supra* n. 19, at 97, 140.

living, simply and only to demonstrate the severity of the impairment, is completely unnecessary to deciding whether unjust discrimination has occurred.[78]

Finally, it is inconsistent with a civil rights law to excuse an employer's behavior simply because other employers may not also act in a similar discriminatory fashion. As the court made clear in *Arline*, if an employer fires an individual expressly because of an impairment, that is sufficient to establish coverage for the individual under the "regarded as" prong of the definition of disability. Of course, an action of this nature would not suffice to qualify an individual for *disability payments*. But it certainly is sufficient to raise a viable claim of discrimination based on that impairment, regardless of whether other employers would have discriminated against the individual as well.

IV. The Real Life Impact of Shrinking Coverage under the ADA

Regardless of what one believes about the original intent of Congress in passing the ADA, the relevant question for Congress *today* is whether people with a range of physical and mental impairments are being treated fairly -- *today*. Consider the following real-life impacts of the Supreme Court's ruling with regard to mitigating measures:

► Stephen Orr, a pharmacist in Nebraska, was fired from his job at Wal-Mart because he needed to take a half-hour uninterrupted lunch break to manage his diabetes. When Mr. Orr challenged his firing under the ADA, Wal-Mart argued that since Mr. Orr did so well managing his diabetes with insulin and diet, he was

[78] As I also note in my academic article, there are other elements that are in play here. For example, "EEOC regulations that emphasize individualized assessments of the impact of impairments on particular individuals, a sophisticated management bar trained in seminars to carefully parse the statutory text of the definition, and finally, the terms of the definition itself, have all resulted in a reading of the ADA that has radically reduced the number of people who can claim coverage under the law." Feldblum, *Definition of Disability*, *supra* n. 19, at 140; *see also id.* at 152 ("[W]hile individualized assessments are . . . critical in determining whether an individual with a disability is qualified for a job (including whether a reasonable accommodation is due to an individual in a particular case), the idea that an individualized assessment would be used to determine whether one person with epilepsy would be covered under the law, while another person with epilepsy would not, was completely foreign both to Section 504 jurisprudence and to the spirit of the ADA as envisioned by its advocates. The words of the ADA, however, can lend themselves to such an interpretation, and the fact that the EEOC's guidance expressly endorsed such an interpretation has cemented that approach in the courts.").

not "disabled" under the ADA. The courts agreed. Although Wal-Mart considered Mr. Orr "too disabled" to work for Wal-Mart, he was not disabled "enough" to challenge his firing under the ADA.[79]

► James Todd, a shelf-stocking clerk at a sporting goods store in Texas, was fired from his job a few months after experiencing a seizure at work. Mr. Todd challenged his firing under the ADA, but the district court never reached the question of whether Mr. Todd had been fired because of his epilepsy. Instead, the court concluded that since Mr. Todd's epilepsy was otherwise well-managed with anti-seizure medication, he was not disabled "enough" to challenge his firing under the ADA.[80]

► Allen Epstein, the CEO of an insurance brokerage firm, was demoted from his job after being hospitalized because of heart disease. He was later fired shortly after telling his employer he had diabetes. Mr. Epstein brought a claim under the ADA, alleging that his employer had discriminated against him because of disability. The court held that because his heart disease and diabetes were well-managed with medication, he was not disabled "enough" to challenge his firing under the ADA.[81]

► Ruth Eckhaus, a railroad employee who uses a hearing aid, was fired by her employer who told her that he "could not hire someone with a hearing aid because [the employer] had no way of knowing if she would remember to bring her hearing aid to work." Ms. Eckhaus brought a claim under the ADA, alleging that she was discriminated against based on her hearing impairment. The court concluded that since her hearing aid helped correct her hearing impairment, Ms. Eckhaus was not disabled "enough" to challenge discrimination based on that impairment. [82]

► Michael Schriner, a salesperson who developed major depression and PTSD after discovering that his minor children had been abused, was fired from his job for failing to attend a training session. Believing he was fired because of

[79] Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002).
[80] Todd v. Academy Corp., 57 F. Supp. 2d 448 (S.D. Tex. 1999).
[81] Epstein v. Kalvin-Miller International, Inc., 100 F. Supp. 2d 222 (S.D.N.Y. 2000).
[82] Eckhaus v. Consolidated Rail Corp., No. Civ. 00-5748(WGB), 2003 WL 23205042 (D.N.J. Dec. 24, 2003)

his depression and PTSD, Mr. Schriner brought a claim under the ADA. But the court never addressed whether his disability was the reason he was fired. Instead, that court concluded that because Mr. Schriner did so well managing his condition with medication, he was not disabled "enough" to be protected by the ADA.[83]

► Michael McMullin, a career law enforcement officer from Wyoming, was fired from his job as a court security officer because an examining physician determined that his clinical depression and use of medication disqualified him from his job. When Mr. McMullin challenged his firing under the ADA, his employer argued that Mr. McMullin was not "disabled" under the ADA because he had successfully managed his condition with medication for over fifteen years. The court agreed. Even though Mr. McMullin's employer had fired him because of his use of medication, the court ruled that he was not disabled "enough" to challenge the discrimination under the ADA. According to the court, "[t]his is one of the rare, but not unheard of, cases in which many of the plaintiff's claims are favored by equity, but foreclosed by the law." [84]

Is this what Congress believes the law should be today?

Or consider the impact of the Supreme Court's ruling that to be covered under the third prong of the definition, an individual must prove that his or her employer thought that he or she was incapable of performing a *broad range of jobs*:

► Rhua Dale Williams, an offshore crane operator with twenty years' experience, was refused a crane operator job because of his two prior back surgeries. Believing the company had regarded him as disabled, Mr. Williams filed a claim under the ADA. The court held that because Mr. Williams had shown that the company believed him incapable of performing only the job of *offshore* crane operator – and not the job of crane operator more generally – he

[83] Schriner v. Sysco Food Serv., No. Civ. 1CV032122, 2005 WL 1498497 (M.D. Pa. June 23, 2005).
[84] McMullin v. Ashcroft, 337 F. Supp. 2d 1281 (D. Wyo. 2004).

was not regarded as incapable of performing a broad range of jobs. As a result, Mr. Williams was not covered by the ADA.[85]

► Hundreds of applicants for truck-driving positions were refused jobs at a motor carrier company solely because of a blanket exclusionary policy that prohibited the hiring of people who used certain prescription medications. The applicants alleged that the company had regarded them as disabled. The courts disagreed, holding that since the applicants had shown only that the company believed them incapable of working as truck drivers *for the company* – and not as truck drivers *in general* – they were not regarded as incapable of performing a broad range of jobs. As a result, the applicants were not covered by the ADA.[86]

Is this what Congress believes the law should be today?

Finally, consider the following real-life impacts of the Supreme Court's ruling that the terms "substantially limits" and "major life activity" must be interpreted strictly:

► Carey McClure, an electrician with twenty years of experience, was offered a job at a General Motors' (GM) assembly plant pending completion of a pre-employment physical exam. When the examining physician saw that Mr. McClure could only lift his arms to shoulder level, Mr. McClure explained that he had muscular dystrophy, and that he could do overhead work by using a ladder, as electricians often do. The physician revoked the job offer, and Mr. McClure brought a claim under the ADA. Even though GM revoked Mr. McClure's job offer because of limitations resulting from his muscular dystrophy, GM argued in court that Mr. McClure did not have a "disability" and was not protected by the ADA. The courts agreed. According to the Fifth Circuit Court of Appeals:

> [Mr. McClure] has adapted how he bathes, combs his hair, brushes his teeth, dresses, eats, and performs manual tasks by supporting one arm with the other, repositioning his body, or using a step-stool or ladder. . . .[Mr. McClure's] ability to overcome the obstacles that life has placed in his path is admirable. In light of this ability,

[85] E.E.O.C. v. HBH Inc., No. Civ.A. 98-2632, 1999 WL 1138533 (E.D.La. Dec. 9, 1999).
[86] E.E.O.C. v. J.B. Hunt Transport, Inc., 321 F.3d 69 (2d Cir. 2003).

> however, we cannot say that the record supports the conclusion that his impairment substantially limits his ability to engage in one or more major life activities.[87]

► Vanessa Turpin, an auto packaging machine operator with epilepsy, resigned after her employer required her to take a work-shift that would have worsened her seizures. Ms. Turpin challenged her employer's actions by filing a claim under the ADA, but the court never decided whether these actions were discriminatory. The court held that even though Vanessa Turpin experienced nighttime seizures characterized by "shaking, kicking, salivating and, on at least one occasion, bedwetting," which caused her to "wake up with bruises on her arms and legs," Vanessa was not "disabled" because "[m]any individuals fail to receive a full night sleep." The court further held that Vanessa's daytime seizures, which "normally lasted a couple of minutes" and which caused her to "bec[o]me unaware of and unresponsive to her surroundings" and "to suffer memory loss," did not render her "disabled" because "many other adults in the general population suffer from a few incidents of forgetfulness a week."[88]

► Zelma Williams is a right-hand dominant person whose right arm was amputated below the elbow. Despite an exemplary work record, Ms. Williams was not among those rehired after the company for which she worked was sold. Ms. Williams brought a claim under the ADA, but the court never decided whether her employer discriminated against her because of disability. Instead, the court held that Ms. Williams was not "disabled" because she was not "prevented or severely restricted from doing activities that are of central importance to most people's daily's lives . . . [like] household chores, bathing oneself, and brushing one's teeth." According to the court, Ms. Williams' amputated arm was only a "physical impairment, nothing more."[89]

► Christopher Phillips, a store maintenance worker with a traumatic brain injury, brought a claim under the ADA after he was fired from his job. Although Mr. Phillips' brain injury caused a four-month coma, weeks of rehabilitation, an

[87] McClure v. General Motors Corp., 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003).
[88] Equal Employment Opportunity Comm'n v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001).
[89] Williams v. Cars Collision Center, LLC, No. 06 C 2105 (N.D. Ill. July 9, 2007).

inability to work for fourteen years, blurred vision, dizziness, spasms in his arms and hands, slowed learning, headaches, poor coordination, and slowed speech, the court held that "this evidence does not establish that [Mr. Phillips] is substantially limited in the major life activities of learning, speaking, seeing performing manual tasks, eating or drinking." Therefore, Mr. Phillips was not "disabled" under the ADA.[90]

► Robert Tockes, a truck driver who had limited use of one hand as a result of an injury he sustained in the Army, was fired from his job and was told by his employer that "he was being fired because of his disability, he was crippled, and the company was at fault for having hired a handicapped person." Mr. Tockes brought a claim under the ADA, but the court never addressed whether he had been discriminated against. Instead, the court concluded that he was not protected by the ADA because he was not "disabled." While, "[o]bviously [the employer] knew [Mr. Tockes] had a disability," the court stated, that "does not mean that it thought him so far disabled as to fall within the restrictive meaning the ADA assigns to the term.[91]

► Mary Ann Pimental, a registered nurse with stage III breast cancer, took time from work to undergo a mastectomy, chemotherapy, and radiation therapy. While Mary Ann was hospitalized and receiving treatment for cancer, the hospital reorganized its management team and eliminated Mary Ann's position. When the hospital refused to rehire her into an equivalent position, Ms. Pimental brought a claim under the ADA. But the court never decided whether Ms. Pimental's breast cancer played a role in the hospital's hiring decision. Instead, the court agreed with the hospital that "the most substantial side effects [of Ms. Pimental's breast cancer and treatment] were (relatively speaking) short-lived" and therefore "they did not have a substantial and lasting effect on the major activities of her daily life." Because Ms. Pimental failed to show she was limited by the breast cancer on a "permanent or long-term basis," she was held to be not

[90] Phillips v. Wal-Mart Stores, Inc., 78 F. Supp. 2d 1274 (S.D. Ala. 1999).
[91] Tockes v. Air-Land Transport Services, Inc., 343 F.3d 895 (7th Cir. 2003).

"disabled" and therefore not protected by the ADA. Sadly, Ms. Pimental died of breast cancer four months after the court issued its decision.[92]

► Daniel Didier, a frozen food delivery manager with a permanently injured arm, was fired from his job because of limitations resulting from his injury. Believing he had been discriminated based on disability, Mr. Didier challenged his firing under the ADA. Despite firing Mr. Didier because of his physical limitations, his employer argued in court that his limitations did not rise to the level of "disability" under the ADA. The court agreed. Even though Mr. Didier "does have some medically imposed restrictions," the court stated, "he has not met his burden of showing that the extent of his limitations due to his impairment are 'substantial.'" According to the court, since Mr. Didier was able to perform activities of daily living, "such as shaving and brushing his teeth, with his left hand . . . . he does not have a disability as defined under the first prong of the ADA."[93]

► Charles Littleton, a twenty-nine-year old man who was diagnosed with "mental retardation" as a young child, applied for a cart-pusher position at Wal-Mart. When he got to the interview, Wal-Mart refused to allow his job coach into the interview as previously agreed upon. The interview did not go well for Mr. Littleton and he did not get the job. Believing he had been discriminated against because of his disability, Mr. Littleton brought a claim under the ADA. But the courts never determined whether Wal-Mart discriminated against him because of his disability. Instead, the courts simply ruled that Mr. Littleton was not "disabled" under the ADA. While acknowledging that Mr. Littleton "is somewhat limited in his ability to learn because of his mental retardation," the Eleventh Circuit Court of Appeals concluded that he was not *substantially* limited in his ability to learn because he could read. In addition, the court concluded that while "[i]t is unclear whether thinking, communicating, and social interaction are 'major life activities'

[92] Pimental v. Dartmouth-Hitchcock Clinic, 236 F. Supp. 2d 177 (D.N.H. 2002).
[93] Didier v. Schwan Food Co., 387 F. Supp. 2d 987 (W.D. Ark. 2005).

under the ADA," Mr. Littleton was not *substantially* limited in these activities because he was able to drive a car and communicate with words.[94]

Is this what Congress thinks the law should be today?

Many of us believe the ADA today is not doing the job it was intended to do. We believe the technical words of the ADA have been misused and misapplied by the courts to exclude people who deserve coverage under the law.[95]

The National Council on Disability, relying upon the expertise of a range of lawyers provided over a period of time, has suggested that the best way to fix the problems encountered in the courts is to change the language of the ADA so that it forces court to focus on the *reason* an adverse action has been taken, rather than on the specifics of a person's physical or mental condition.[96] In this way, litigation under the ADA would mirror litigation under Title VII of the Civil Rights Act – in which a plaintiff must prove that discrimination occurred *because of* race, sex, religion, or national origin, but is not required to get into the specifics of his or her race, sex, religion, or national origin.

One can achieve this result with two basic changes to the language of the ADA. First, the definition of "disability" should be a "physical or mental impairment," with those terms defined as they have been for years by the regulatory agencies. While this obviously changes the *words* of the original ADA, it does not change the *intent* of Congress in terms of coverage under the law. As I explain above, it was understood

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[94] Littleton v. Wal-Mart Stores, Inc., 231 Fed. Appx. 874 (11th Cir. 2007).

[95] *See* Feldblum, Definition of Disability, *supra* note 19, at 93 ("That decision [*Sutton*] threw into question coverage for thousands of individuals with impairments whom I, and other advocates who worked on the ADA, presumed Congress had intended to cover when it passed the ADA."); *see also* Claudia Center and Andrew J. Imparato, *Development in Disability Rights: Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL'Y REV 321, 323 (2003) ("In light of the unwillingness of the U.S. Supreme Court and the lower federal courts to interpret the ADA's definition of disability in an inclusive manner, consistent with the intent of the law's drafters in Congress, it is time to rewrite the ADA's definition of disability and restore civil rights protections to the millions of Americans who experience disability-based discrimination."); Robert Burgdorf, *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 561(1997) ("The restrictive interpretations of statutory protection under the ADA and Rehabilitation Act, however, have engendered a situation in which many cases are decided solely by looking at the characteristics of the plaintiff.").

[96] NATIONAL COUNCIL ON DISABILITIES, RIGHTING THE ADA, Executive Summary, 13 (2004), *available at* http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm.

and expected during passage of the ADA that a person with any type of impairment, even a minor one, would be covered under the third prong of the definition *if* the person could prove that he or she had been subjected to adverse action *because of* that physical or mental impairment. Indeed, it was *based* on this assumption of broad coverage that Congress chose to go with the long-standing definition of Section 504 of the Rehabilitation Act, rather than with the new definition offered by the National Council of Disability that had been incorporated into the first version of the ADA.[97] The rejection of that new definition was not because Congress thought the definition was too broad. Rather, it was because Congress *agreed* that such breadth was necessary – and believed it was *already encompassed* under the third prong of the definition.[98]

Changing the ADA in this manner would bring it into conformity with Title VII of the Civil Rights Act of 1964. Under that law, *every* person in this country is covered, since every person has a race, a sex, a religion (or lack of a religion), and a national origin. And any individual may believe that he or she has been discriminated against because of his or her race, sex, religion, or national origin. But under our system of law, an individual claiming discrimination on any of these grounds must prove that the discrimination occurred *because of* the prohibited characteristic and could not be explained based on a legitimate non-discriminatory reason. This same body of law would apply to individuals arguing discrimination on the basis of disability.

Second, the ADA should be modified so that the employment section prohibits discrimination "on the basis of disability," rather than the existing formulation that prohibits discrimination "against a qualified individual with a disability." This change would again bring the ADA into conformity with Title VII of the Civil Rights Act of 1964, which similarly prohibits discrimination "on the basis of" race, sex, religion, and national origin. This formulation ensures that courts will begin their analysis by focusing on whether a person has proven that a challenged discriminatory action was taken *because of* a personal characteristic – in this case, disability – and not on whether the person has proven the existence of various complicated elements of the

[97] S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. S5089 (daily ed. Apr. 28, 1988)
[98] *See* Feldblum, *Definition of Disability*, *supra* note 19, at 126-129.

characteristic.[99]

S. 1881, the Americans with Disabilities Act Restoration Act, would make these changes in the law. I believe this bill is an appropriate and justified response by Congress to the judicial narrowing of coverage under the ADA and would provide the essential protection needed by those who experience discrimination in our country today.

Thank you.

[99] Such a change would not change the right of an employer to defend a claimed discriminatory action on the grounds that a particular applicant or employee does not have the requisite qualifications for the job. The four-part test set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) for a plaintiff's *prima facie* case of discrimination under Title VII would continue to apply to individuals bringing cases under the ADA. Under this test, a plaintiff must present evidence that he or she is a member of a class protected by the law; that he or she was subjected to an adverse employment action; that the employer treated similarly situated employees who were not members of the protected class more favorably; *and that the plaintiff was qualified to perform the required functions of the job*. *Id*. at 802. Thus, a basic level of qualification is already necessary to meet the threshold of establishing a prima facie case under Title VII and would apply as well under the ADA. To the extent that an employer wishes to impose affirmatively a qualification standard that will screen out, or will tend to screen out, persons with disabilities, the ADA permits an employer to do so if such standards are job-related and consistent with business necessity. *See* 42 U.S.C. § 12112(b)(6) and § 12113(a) (2007). This defense on the part of the employer would not be changed by the suggested changes to the general employment section.

APPENDIX A

People Covered Under Section 504 of the Rehabilitation Act
vs.
People Not Covered Under the ADA

APPENDIX B

The Effect of the Supreme Court's Decisions on Americans with Disabilities